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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-575

GEORGE SHAMEIA, ... Petitioner,

v.

UNITED STATES OF AMERICA, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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No._____

GEORGE SHAMEIA, ... Petitioner,

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UNITED STATES OF AMERICA, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner George Shameia respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 31, 1972 and subsequently reaffirmed by the denial of a petition for rehearing entered on September 11, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, it is printed in the Appendix, infra, p.p. 3a-9a. It affirmed the Order and Judgment of the District Court for the Eastern District of Kentucky, which Order is printed in the Appendix, infra, p.p. 1a-2a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 31, 1972. A timely petition for rehearing was denied on September 11, 1972, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioner was denied both due process of law and equal protection of the laws when he was refused an instruction on entrapment while at the same time maintaining his innocence.

2. Whether the petitioner's constitutional rights were denied when the Court refused to instruct the jury on entrapment where agents and employees of the United States induced and otherwise innocent man to allegedly exchange non-food items and cash for food stamps in violation of the Food Stamp Act where the record is completely deviod of any evidence of past acts, complaints, or prior inclinations of the petitioner which would afford the government with reasonable grounds for believing the petitioner was engaged in alleged unlawful business.

STATEMENT OF THE CASE

The petitioner was charged, by information, with violation of provisions of the Food Stamp Act of 1964 (7 U.S.C. §2011, et. seq.) and the regulations promulgated thereunder. The charges related specifically to the alleged acceptance of food stamps in exchange for non-food merchandise and the acceptance of food stamps in exchange for cash.

On October 25, 1971, a trial on the merits was held in the United States District Court for the Eastern District of Kentucky, at Lexington, the Honorable Mac Swinford presiding. At trial the Petitioner requested, from the Court, an instruction on entrapment while maintaining at the same time his complete innocence. The evidence presented revealed that agents and employees of the United States induced an otherwise innocent man to allegedly exchange non-food items and cash for food stamps in violation of the Food Stamp Act and the record is completely devoid of any evidence of past acts, complaints, or prior inclinations of the petitioner which would afford the government with reasonable grounds for believing that the petitioner was engaged in alleged unlawful business. The Court refused to instruct the Jury on the issue of entrapment and a verdict of guilty of nine counts was rendered. An appeal was then taken to the United States Court of Appeals for the Sixth Circuit. Briefs were submitted, oral argument was heard and after due deliberation the Court affirmed the decision of the United States District Court for the Eastern District of Kentucky in an opinion written by Circuit Judge Kent and filed July 31, 1972. The Court held, in short, that a Defendant in a criminal prosecution may not both maintain his

innocence and at the same time request, and be granted, an instruction on entrapment. The Court indicated, contrary to earlier decisions, that such alternative pleading would not be allowed in criminal cases. The Petitioner filed with the Court of Appeals a petition for rehearing which petition was denied by the Court on September 11, 1972, this petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE ALLOWANCE OF ALTERNATIVE PLEADING IN A CRIMINAL PROSECUTION; SPECIFICALLY THE ALLOWING OF AN INSTRUCTION ON ENTRAPMENT WHERE A PERSON, AT THE SAME TIME, CONTINUES TO MAINTAIN HIS INNOCENCE.

The Court of Appeals for the Sixth Circuit in denying the Petitioner's appeal did not fully recognize the importance of the issue involved and decided the question, it seems, by merely counting the number of Circuits ruling against the allowance of alternative pleading in a criminal prosecution. In reaching such a conclusion the Court recognized the conflict among the Circuits as to the appropriateness of such pleading. In fact, Judge Kent, stated at Page 2 of the opinion of the Court that "this issue has never been squarely presented in this Circuit, nor has it been decided by the Supreme Court of the United States." This statement indicates the importance of the issue

presented. So long as the conflict among the Circuits exists, Defendants in criminal prosecutions will be denied both equal protection of the laws and due process of law depending upon where such prosecution takes place.

Essentially three views exist in regard to such alternative pleading in criminal prosecutions. Summarized, these views are as follows:

1. A Defendant who denies the commission of an act is not entitled to plead the defense of entrapment.

2. Under special circumstances a Defendant may both deny guilt and plead the defense of entrapment.

3. A Defendant in a criminal prosecution is absolutely entitled to an instruction on the issue of entrapment.

Various Circuits adhere to the view that alternative pleading in a criminal prosecution will be disallowed. The rationale behind these decisions is that the two defenses are totally inconsistent and in a criminal proceeding one cannot avail himself of inconsistent defenses. For cases adhering to this view see, *United States* v. *Carter*, 326 F.2d 351, 353 (7th Cir. 1963); *Ware* v. *United States*, 259 F.2d 442 (8th Cir. 1958); *United States* v. *Gary*, 447 F.2d 907, (9th Cir. 1971). A common element in these cases is that all have dealt with persons who were known narcotics users or known to have been trafficking in narcotics. The Petitioner is merely the owner of a small neighborhood grocery store with no record or prior misbehavior.

The second view in regard to alternative pleading in a criminal prosecution is that the two defenses will be allowed if the Defendant admits the act but denies that it constitutes a crime; usually where he admits to some but not all acts. For example, the fact situation involved in the principle case which upholds this view, *Henderson* v. *United States*, 237 F.2d 169, (5th Cir. 1956) where the Defendant admitted making whiskey but denied that he was part of a conspiracy. In the prosecution of the Defendant for distilling non-tax paid whiskey, the Court held that he could admit operating an illicit still, deny being a party to the conspiracy charge, and still claim that such overt acts that he did commit, were done as the result of entrapment. The Court further stated, at Page 173 of its opinion that "[t]he two defenses [did] not seem . . . so repugnant that proof of the one necessarily disproves the other." This view was reaffirmed by the Fifth Circuit in *Sears* v. *United States*, 343 F.2d 143 (5th Cir. 1965). There the Court, reversing a conviction for conspiracy to violate liquor laws, stated the following; we do not think it is impermissibly inconsistent for a Defendant to deny the acts charged, yet urge the Court on Motion for Acquittal that the government's own evidence establishes entrapment as a matter of law. (at p. 145). Therefore, the Fifth Circuit has expressed the feeling in both of the above-cited cases that entrapment was not inconsistent with a plea of not guilty and that the allowance of both defenses would assist rather than hinder a jury in its search for the truth.

The third theory in regard to alternative pleading in a criminal prosecution is that which the Petitioner urges upon this Court. It is really an expansion of

the facts and circumstances theory and allows both a denial of the act and an instruction to the jury on entrapment.

The Court which has ruled most clearly that such alternative pleading will be allowed has been the United States Court of Appeals for the District of Columbia. The District of Columbia Court stated in *Hansford* v. *United States*, 303 F.2d 219 (D.C. Cir. 1962) (en banc) as follows:

> [W]e note that the . . . two fold defense though permissible, was inconsistent. The defenses were alternative but not inconsistent. It was consistent with Defendants denial of the transaction to urge if the jury believed it did occur, the government's evidence as to how it occured indicated entrapment.

The *Hansford* case, *supra*, involved a Defendant who had denied having sold heroin to a government agent and had asked for an instruction on the issue of entrapment. The instruction was given and the District of Columbia Court, on review, emphasized that it was consistent and not just permissible to allow the instruction. It stated, in essence, that public policy dictates that such pleading be allowed.

Indeed, to force a Defendant to admit the commission of a crime in order to obtain an instruction on entrapment allows the government to escape the burden of proving beyond a reasonable doubt that the Defendant is guilty of the crime. If such a system is utilized the only requirement on the government is that of proving that the Defendant was free to com-

mit the crime. Ordinarily, Courts will look to the origin of the intent to commit the crime. However, some Courts go further by looking to the conduct of the government officials involved. If such conduct deviates from normal practices so much so as to be shocking and unreasonable entrapment will be found to exist regardless of whether or not the Defendant was predisposed to commit the crime.

The Petitioner submits that the better view in regard to the allowance or disallowance of alternative pleading in a criminal prosecution is that exemplified by *Hansford* v. *United States, supra.* The Court of Appeals for the Sixth Circuit had in the past expressed its apparent acceptance of this view in the case of *United States* v. *Baker*, 373 F.2d 28 (6th Circuit 1967) where there was an apparent inconsistency in the denial of knowledge and the claim of entrapment. The Court stated at page 30 of its opinion that,

> . . . what little evidence there is represents testimony from which the jury could have inferred that this appellant lacked prior association with narcotics and was more than normally suggestible. This seems to us (**if only barely!**) to warrant submission of the issue of entrapment to the jury. (emphasis supplied)

The Court of Appeals for the Sixth Circuit in retreating from the position stated in the *Baker* case *supra,* implied that its decision was based upon neither logic nor a sense of fairness and justice. Instead the decision appears to have been reached by merely counting the number of Circuits which adhere to each particular view. If the present situation is allowed, by this Court,

to continue, this means, in effect, that although we are a nation under one Constitution a man accused in a criminal prosecution in one portion of the country will be denied the availability of alternative pleading while another man, in a different portion of the country, given the same set of facts and accused of the same crime, will be allowed to plead thusly. Had the Petitioner resided in a jurisdiction, such as the District of Columbia, which adheres to the theory which allows a Defendant in a criminal prosecution to both maintain his innocence and receive an instruction on entrapment he would not be before this Court today. So long as such an intolerable situation exists within the United States the quality of justice which a person receives in a criminal prosecution will not be dependent upon how vigorously constitutional principles are applied but rather upon which portion of the nation he resides in.

2. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE QUESTION OF THE EXISTENCE OR NON-EXISTENCE OF ENTRAPMENT IS A FACTUAL ONE WHICH SHOULD BE RESOLVED ONLY BY THE JURY REGARDLESS OF THE AMOUNT OF EVIDENCE INTRODUCED AT TRIAL AND TO ALLOW OTHERWISE RESULTS IN A DENIAL OF GUARANTEED CONSTITUTIONAL RIGHTS.

There is no question, in this case, that entrapment was present. All evidence of alleged illegal conduct on the part of the Petitioner was introduced at trial by the government's agents. Such evidence was completely denied and rebutted by the Petitioner. Where such a situation exists the Court should take note of the obvious possibility of entrapment thereby allowing the

jury to determine its existence or non-existence as a factual question.

The record is barren of any evidence whatsoever that the Defendant committed any of the alleged illegal acts. The only evidence present is that submitted by the government that its agents, by coercion and continued persuasion, induced the Defendant to commit the alleged offenses; **facts which obviously indicate the entrapment of the Defendant.** The record is completely devoid of any evidence of past acts, complaints, or prior inclinations of the petitioner which would afford the government with reasonable grounds for believing that the petitioner was engaged in alleged unlawful business. (T.E. p. 131 App. pg 10a) (T.E. pp. 43-45 App. pg. 12a-13a) (T.E. pp. 72-73 App. p. 10a).

The Defendant submits that where the government conceives and sets up the entire scheme in order to induce a person to commit a crime, thereby compelling its agents to perform illegal acts themselves, constitutes entrapment as a matter of law and certainly is sufficient to cause the issue of entrapment to be submitted to the jury. The failure of the Court to instruct on entrapment results in a denial of guaranteed constitutional rights. (T.E. pp. 233-234; App. pg 11a).

The theory that factual issues are to be determined by the jury is one so basic as to not require case citation. By being denied the right of having the jury determine the issue of entrapment, the Petitioner was denied due process of law. The jury is charged with the responsibility of determining factual questions, including the question here, of whether or

not the facts introduced at trial constitute entrapment.

The only evidence submitted at trial which would indicate criminal conduct by the Petitioner was that introduced through the testimony of government agents. This testimony was completely denied by the Petitioner. Whether or not there was sufficient evidence of persuasion by government agents to induce the Petitioner to commit the offenses charged was a factual question and one which could only have been determined by the jury. The Petitioner therefore submits that the interests of justice and fairness dictate that alternative pleading be allowed and an instruction of entrapment be given to the jury in such a situation. Indeed, the issue of entrapment is essentially a factual one and the jury as the trier of facts should be allowed to determine its existence or nonexistence.

The Court of Appeals for the Sixth Circuit in retreating from the position stated earlier in *United States* v. *Baker, supra*, has, in effect, denied the Petitioner due process of law by not requiring that the jury make the final determination as to entrapment. It is difficult to believe that a Court would deny an instruction on the issue of entrapment when there is some evidence of entrapment but still harder to believe that when the evidence of entrapment is substantial as in this case bar the jury from determining the presence or absence of entrapment. In so doing, the Court of Appeals for the Sixth Circuit has denied the Petitioner due process of law guaranteed him by the Constitution of the United States and at the same time illogically and unreasonably retreated from a fair

and just position; a position which this Court must now redefine and reimpose so that guaranteed constitutional principles are applied and adhered to in the future.

CONCLUSION

The Petitioner submits that this case presents not only a conflict among the Circuit Courts of Appeal but is also a case of first impression before this Court. Furthermore, since the Defendant's constitutional rights, as indicated above, have been severely jeopardized a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit which affirmed the judgment of the District Court for the Eastern District of Kentucky.

Respectfully Submitted,

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Attorney for Petitioner

CERTIFICATION OF SERVICE

I hereby certify that on this 10th day of October, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Eugene Siler, Jr., United States Attorney for the Eastern District of Kentucky, Federal Building, Lexington, Kentucky, Counsel for the Respondent. I further certify that all parties required to be served have been served.

ANGGELIS & VIMONT

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FILED 11-4-71

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

UNITED STATES OF AMERICA

VS. **No. 10,194**

GEORGE SHAMEIA

ORDER

On October 29, 1971, came the attorneys for the plaintiff, the defendant in person, his attorney and the jurors as on October 28, 1971.

The introduction of evidence for the plaintiff was resumed and concluded.

In the presence of the jurors, but out of their hearing, the attorney for the defendant moved the Court for the entry of a Judgment of Acquittal. The Court, being advised, overruled the motion.

Counsel for the defendant waived an opening statement and the evidence for the defendant was then introduced and concluded.

Whereupon, in the presence, but out of the hearing of the jurors, the attorney for the defendant moved the Court for the entry of a Judgment of Acquittal. The Court, being advised, overruled the motion.

Mr. Collis made a closing argument for the defendant and Mr. Noble made a closing argument for the plaintiff.

The hour for noon recess having arrived, the Court admonished the jurors and a recess until 1:15 P.M. was announced.

Following the recess, came the attorneys for the plaintiff, the defendant, his attorney and the jurors.

After discharge of the alternate jurors the jury retired to the jury room to consider the issues.

Later the jury returned into open court and in the presence of the attorneys for the plaintiff, the defendant and his attorney reported its verdict, to wit:

"The jury hereby find the defendant guilty on all nine counts as charged.

/s/ William B. Bryan
Foreman."

November 3, 1971

/s/ Mac Swinford
MAC SWINFORD, JUDGE

A True Copy Attest
Davis T. McGarvey, Clerk
U.S. District Court
By /s/ Helen M. Jennings
D.C.

* * * * * * * * *

No. 72-1086

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ... *Plaintiff-Appellee*

versus

GEORGE SHAMEIA, ... *Defendant-Appellant*

Appeal from the United States District Court for The Eastern District of Kentucky.

Decided and Filed July 31, 1972.

Before: PHILLIPS, Chief Judge, KENT, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

KENT, Circuit Judge. George Shameia, herein referred to as the defendant, appeals from his convictions based on a multicount information for violation of various provisions of the Food Stamp Act, 7 U.S.C. § 2011 et seq., relating to acceptance of food stamps for nonfood items and exchanging food stamps for cash. The defendant was the owner and operator of a grocery store. The evidence by the United States was the Government agents went to the defendant's store on more than one occasion and received nonfood items or cash in exchange for food stamps in violation of the Act.

On the trial the defendant took the stand and specifically and repeatedly denied any transactions with the Government agents and denied that he had ever partici-

pated in transactions of the nature to which the Government agents testified. At the close of the evidence the defendant submitted to the court proposed instructions on entrapment. The trial court refused to instruct the jury on the issue of entrapment.

The United States now claims that the issue of entrapment may not be submitted to the jury unless the defendant requesting such instructions has affirmatively admitted the facts relating to the offense in question. This issue has never been squarely presented in this Circuit, nor has it been decided by the Supreme Court of the United States. Those Courts of Appeals which have considered the issue are split. It would appear that the Courts of Appeals for the First, Fifth, Seventh and Ninth Circuits do not allow the jury to consider the defense of entrapment where an accused denies the commission of the act constituting the crime charged.[1] The Court of

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1. *Sylvia* v. *U.S.*, 312 F.2d 145, 147 (1st Cir. 1963) *Cert. Den.* 374 U.S. 809 (1963); *U.S.* v. *Rodrigues*, 433 F.2d 760, 761 (1st Cir. 1970) *Cert. Den.* 401 U.S. 943 (1971); *Hamilton* v. *U.S.*, 221 F.2d 611, 614 (5th Cir. 1955); *Rodriguez* v. *U.S.*, 227 F.2d 912, 914 (5th Cir. 1955); *Sears* v. *U.S.*, 343 F.2d 139 (5th Cir. 1965); But see: *McCarty* v. *U.S.*, 379 F.2d 285 (5th Cir. 1967) *Cert. Den.* 389 U.S. 929 (1967); *U.S.* v. *Pickle*, 424 F.2d 528 (5th Cir. 1970); *U.S.* v. *Kaiser*, 138 F.2d 219, 220 (7th Cir. 1943) *Cert. Den.* 320 U.S. 801 (1944); *U.S.* v. *Georgiou*, 333 F.2d 440 (7th Cir. 1964) *Cert. Den.* 379 U.S. 901 (1964); *U.S.* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970); *Eastman* v. *U.S.*, 212 F.2d 320, 322 (9th Cir. 1954); *Ortega* v. *U.S.*, 348 F.2d 874 (9th Cir 965); *Corocoran* v. *U.S.*, 427 F.2d 16, 17 (9th Cir. 1970); *U.S.* v. *Rodriquez*, 446 F.2d 859 (9th Cir. 1971) *Cert. Den.* —— U.S. ——. But see also: *Sendejas* v. *U.S.*, 428 F.2d 1040 (9th Cir. 1970), *Cert. Den.* 400 U.S. 879.

Appeals for the Eighth Circuit has specifically refused to rule on the issue up to this time. *Kibby* v. *U.S.*, 372 F.2d 598 (8th Cir. 1967) *Cert. Den.* 387 U.S. 931. The situation in the Tenth Circuit is unclear. *Martinez* v. *U.S.*, 373 F.2d 810 (10th Cir. 1967); *United States* v. *Gibbson*, 446 F.2d 719 (10th Cir. 1971). But see: *McCarthy* v. *U.S.*, 399 F.2d 708 (10th Cir. 1968), and *Wolford* v. *U.S.*, 401 F.2d 331 (10th Cir. 1968). The Court of Appeals for the District of Columbia permits the defendants to raise the defense of entrapment despite the fact that they may claim their innocence of the act constituting crime. *Hansford* v. *U.S.*, 303 F.2d 219 (D.C. Cir. 1962) (en banc); *United States* v. *Neuman*, 436 F.2d 285 (D.C. Cir. 1970) *Cert. Den.* 401 U.S. 974 (1971).

This Court has been presented with a situation where a defendant denied knowledge of certain of the facts and still relied upon the defense of entrapment. *United States* v. *Baker*, 373 F.2d 28 (6th Cir. 1967). In the *Baker* case the defendant admitted the delivery of the package containing morphine to the Government agent while denying that he knew it was morphine, and at the same time asserting that he was entrapped by the Government agent. This Court reversed the conviction because of the failure of the trial court to instruct on entrapment. We do not see the *Baker* case as being dispositive of the issue presented here.

The source of the right to the defense of entrapment in prosecutions in courts of the United States is *Sorrells* v. *United States*, 287 U.S. 435. In *Sorrells*, however, the defendant admitted all of the facts relating to the offense charged but claimed that the Government's

evidence, as well as the evidence for the defense, established that he had been entrapped into the commission of the offense charged. Mr. Chief Justice Hughes in discussing the defense of entrapment in *Sorrells* and at 287 U.S. 451, 452:

> For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. *Grimm* v. *United States, supra.* The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.
>
> * * *
>
> The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.

We deem it unnecessary in this case to take an absolute position that there are no circumstances where the defense of entrapment will be unavailable because of the failure of the defendant to take the witness stand and admit the facts constituting the offense in question. It may well be that as suggested in *Sendejas* v. *U.S.*, 428 F.2d 1040 ((9th Cir. 1970), *Cert. Den.* 400 U.S. 879 (1970), the Government's proofs will establish entrapment as a matter of law. Under such circumstances the defense of entrapment would be available to the defendant. It could be said that by asserting such defense the defendant admits the facts without taking the witness stand.

In *Sorrells* the facts presented by the evidence for the United States and for the defendant clearly would have been sufficient to establish a defense of entrapment. The same was true in *Sherman* v. *U.S.*, 356 U.S. 369, where the Court, speaking through Mr. Chief Justice Warren, said at page 373:

> We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

And there may be cases such as our own, *United States* v. *Baker*, 373 F.2d 28, where there is an apparent inconsistency in the denial of knowledge and the claim of entrapment. Such is not the case here. The defendant

here took the witness stand and absolutely denied that he did any of the acts necessary to constitute the crimes charged. In the course of his testimony he did state that he *would have been* unwilling to commit any of these crimes while denying that he did any of the acts. We, therefore, hold that the defendant may not absolutely deny every act necessary to constitute the offense and then claim entrapment on the part of the Government agents.

In reaching this conclusion we join the majority of the other Circuits. *United States* v. *Rodrigues,* 433 F.2d 760, 761 (1st Cir. 1970), *Cert. Den.* 401 U.S. 943 (1971):

> "The appellant cannot maintain that on this particular occasion he did not sell anything but that, in any case, he was entrapped into it."

Unitedd States v. *Pickle,* 424 F.2d 528 (5th Cir. 1970):

> "The rule in this Circuit is that a denial of the commission of the acts charged is inconsistent with a defense of entrapment."

United States v. *Carter,* 326 F.2d 351, 353 (7th Cir. 1963):

> "Moreover, defendant's trial testimony in which he denied the marihuana transaction is inconsistent with a claim of entrapment on that occasion."

United States v. *Gary,* 447 F.2d 907, 909 (9th Cir. 1971):

> "The rule in this Circuit is that a defendant must admit commission of the acts charged before raising the defense of entrapment."

Ware v. *United States*, 259 F.2d 442, 445 (8th Cir. 1958):

> "* * * * the appellant himself took the stand in his own behalf and denied making the sales in question. He is in no position now to claim that he was entrapped into making the sales which he denies making."

After a close examination of the record in this case we are satisfied that the evidence for the Government established only that the Government, through its agents, afforded to the defendant an opportunity to violate the law. There was a complete lack of any evidence to show any persuasion by Government agents to induce the defendant to commit the offenses of which the jury found him guilty.

The judgment of the District Court is affirmed.

* * * * *

T.E. p. 131

(Mr. Collis) Q When you went in there, your instructions were to try to buy things that were not consumable as well as things that were consumable, is that correct?

(Mrs. Cox) A That's right.

(Mr. Collis) Q And you knew the reason why you went in there was for the purpose of trying to obtain this?

(Mrs. Cox) A That's why I went.

* * * * * * * * *

T.E. pg 72-73

(Mr. Collis) Q You did not tell them to try to buy items that were not consumable?

(Mr. Settles) A I told them to try.

(Mr. Collis) Q So you told them to violate the law, is that correct?

(Mr. Settles) A Well, I guess if you would say it that way.

(Mr. Collis) Q To commit a crime?

(Mr. Settles) A Yes, sir.

(Mr. Collis) Q And you stood outside waiting for them to commit a crime?

(Mr. Settles) A Yes, sir.

* * * * * * * * *

T.E. Pg 233-234

Reporter's Note: The following instructions were requested defense counsel but were not given by the Court:

INSTRUCTION I

"The Court instructs the Jury that the criminality of an act depends on whether the criminal intent originated in the mind of the "entrapping person, then you shall find the Defendant not guilty.

INSTRUCTION II

"The Court instructs the Jury that if the testimony makes patently clear that otherwise innocent person was induced to commit act complained of by trickery, persuasion or fraud of government agent, then you shall find the Defendant not guilty.

U.S. v. *Burkhart,* 345 F 2d 772

INSTRUCTION III

"The Court instructs the Jury that if you find from the evidence that the Defendant was entrapped, that is the conception and planning of the offense by enforcement officer and procurment of its commission by one who would not have perpetrated it, except for trickery, persuasion or fraud of officer, then you shall find the Defendant not guilty.

Eisner v. *Commonwealth,* 375 SW 2d 825")

* * * * * * * * *

T.E. pg 43-45

(Mr. Noble) Q And when did you initiate your investigation, Mr. Settles?

(Mr. Settles) A On April the 22nd.

(Mr. Noble) Q Which year?

(Mr. Settles) A 1971.

(Mr. Noble) Q And relate briefly what you did to organize your investigation and how you approached the matter.

(Mr. Settles) A Well, on April the 22nd, with two investigative aides which had been previously hired, we came to Lexington and drove by George's Grocery, which is at 700 Dakota Street.

(Mr. Noble) Q Now, will you tell the names of the investigative aides that you had on that occasion?

(Mr. Settles) A I had Faye Cox and Edith Rogers.

(Mr. Noble) Q And about what time on that day did you arrive at Mr. Shameia's establishment?

(Mr. Settles) A It was approximately 4:00 o'clock in the afternoon.

(Mr. Noble) Q Where was this place located?

(Mr. Settles) A 700 Dakota, at the corner of Seventh and Dakota.

(Mr. Noble) Q Do you know Mr. Shameia?

(Mr. Settles) A No, I don't.

(Mr. Noble) Q You were never in his store?

(Mr. Settles) A No, sir, I have never been in his store. He has been pointed out to me since I came to court, but that is the only time.

(Mr. Noble) Q Was there not any sign or poster to indicate the name of the store?

(Mr. Settles) A Yes, there was a sign on the front of the store which said, "George's Grocery" or "Market," I forget which.

(Mr. Noble) Q Now, what did you do on this particular day? You say you arrived about 4:00 o'clock?

(Mr. Settles) A Yes, sir, we drove by the store and I pointed it out to the two investigative aides and then we drove around the block and we parked, and I furnished the aides with food stamps with which to go to George's Market and make purchases of eligible and ineligible items if possible.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-575

GEORGE SHAMEIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of having accepted food stamps in exchange for non-food merchandise and cash refunds, in violation of 7 U.S.C. 2011, *et seq.* He was sentenced to imprisonment for thirty days and fined one thousand dollars. The court of appeals affirmed (Pet. App. 3a-9a).

1. The evidence showed that petitioner was the proprietor of George's Grocery, a retail store in Lexington, Kentucky, that was authorized by the United States Department of Agriculture to participate in the federal food stamp program (Tr. 18,

20).[1] On three occasions in April and May 1971, two undercover investigative aides of the Department of Agriculture obtained non-food merchandise in exchange for food stamps at petitioner's store.[2] A typical instance occurred on April 27, 1971. On that date Robert Settles, an auditor with the Department's Inspector General's office, drove the aides, Faye Cox and Edith Rogers, to the vicinity of the store (Tr. 40, 55). Before the women left the car they gave Settles all the money in their possession and Settles gave them food stamps whose serial numbers had been recorded. Settles told the women to attempt to purchase both food and non-food items with the stamps and to attempt to exchange stamps for cash at petitioner's store (Tr. 45, 55-59). As Settles watched from half a block away, Mrs. Cox and Mrs. Rogers walked into the store (Tr. 56). The women testified that they were waited on by petitioner. Using food stamps, they each purchased various food and non-food items (Tr. 120-121, 144). After Mrs. Cox made her purchases, she inquired whether petitioner would like to buy some food stamps. Petitioner asked how many she was selling. When Mrs. Cox said she had a $20 book, petitioner offered $15 for it; Mrs. Cox agreed to that price. She handed the stamps to petitioner and received $15 in cash in return (Tr. 122). Mrs. Rogers also sold petitioner a $20 book for $15 in cash (Tr. 145). After the

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[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the Clerk of the Court.

[2] Food stamps may not be used to obtain non-food items at grocery stores.

women left the store, Mr. Settles looked over their purchases and found such non-food items as shoe polish, insecticide, cigarettes, paper plates, and laundry starch (Tr. 62-63). Each woman had $15 in cash (Tr. 64). Subsequently, food stamps whose serial numbers matched those of the stamps that Settles had given the women and which bore the authorization code for petitioner's store were recovered by federal agents at the Federal Reserve Bank in Cincinnati.[2] Petitioner testified at trial and denied that he ever accepted food stamps in exchange for non-food items or cash (Tr. 178, 186).

2. Petitioner contends that the trial court erred in refusing to instruct the jury on the issue of entrapment. This contention is not well founded. In the first place, as the court of appeals noted (Pet. App. 9a), there was a complete lack of evidence to show that government agents had persuaded an otherwise unwilling person to commit a crime. The women investigative aides in this case merely tendered food stamps for both food and non-food items and also asked petitioner if he would pay cash for some stamps. Petitioner accepted the stamps without hesitation. There was thus insufficient evidence upon which to submit the defense of entrapment to the jury.

In any event, the court below correctly held that

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[2] Grocers authorized to participate in the federal food stamp program may redeem stamps through banks, which in turn redeem them through the Federal Reserve System (Tr. 96-97). Each grocer is required to place his food stamp program authorization code on the back of stamps he redeems (Tr. 95).

by denying that he had ever accepted the stamps, petitioner was precluded from raising the entrapment defense. *United States* v. *Rodrigues*, 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *Canal Zone* v. *Risbrook*, 454 F. 2d 725 (C.A. 5); *United States* v. *Carter*, 326 F. 2d 351, 353 (C.A. 7); *Ware* v. *United States* 259 F. 2d 442, 445 (C.A. 8); *United States* v. *Mehciz*, 437 F. 2d 145, 149 (C.A. 9), certiorari denied, 402 U.S. 974. Only the District of Columbia Circuit has announced a contrary rule permitting a defendant to raise the defense of entrapment while maintaining that he did not commit the acts with which he is charged. *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C.). In view of the Court's denial of certiorari in later cases adhering to the traditional rule and not following *Hanford*, and in view of unanimity of the other circuits which have considered the issue, review of the instant decision by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[3] This case does not present any issue about the underlying nature of the entrapment defense and there is thus no reason to await decision in *United States* v. *Russell*, No. 71-1585, certiorari granted, October 16, 1972, and *United States* v. *McGrath*, No. 72-761, pending on petition for certiorari.

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